Supreme Court, U.S.
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85-581

No.

IN THE

Supreme Court of the United States

October Term, 1985

DAVID BULLOCH, et al., Petitioners,

v.

PAUL B. PEARSON, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly construed petitioners' complaint narrowly in order to apply the doctrine of collateral estoppel to bar their *Bivens* suit against ranking federal government officials and contractors.

PARTIES TO THE PROCEEDING

Petitioners other than David Bulloch are: McRae N. Bulloch, Kern Bulloch, Douglas Corry, A. E. Seegmiller, Myron Higbee, Nelson Webster, Lillian W. Clark (for herself and as representative of the estate of Douglas C. Clark, deceased), Lambeth Brothers Livestock (a partnership), T. Randall Adams, and Dee Evans.

Respondents other than Paul B. Pearson are: Bernard Trum, Gordon Dunning, Leo F. Bustad, General Electric Corp., John J. Finn, Charles F. Eason, Don Fowler, H. A. Kornberg and John H. Rust.

Three defendants named in the amended complaint, Utah State Board of Health, Monroe Holmes and George Spendlove, were not served. The district court thus certified its order as a final order under Rule 54 (b), Federal Rules of Civil Procedure. (App., *infra,* 3a)

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No.

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October Term, 1985

DAVID BULLOCH, et al., Petitioners,

v.

PAUL B. PEARSON, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The judgment and decision of the court of appeals (App., *infra,* 1a-5a) is not yet reported. The district court's opinion dismissing petitioners' complaint (App., *infra,* 9a-31a) is unreported, as is the district court's order (App., *infra,* 6a-8a) denying petitioners' motion for reconsideration.

JURISDICTION

The judgment of the court of appeals was entered July 26, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (f) All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

1. Petitioners are Utah residents who owned sheep that were exposed to radiation from nuclear tests conducted by the United States at the Nevada Proving Grounds in the Spring of 1953. Soon after those tests, thousands of petitioners' sheep and lambs died. In 1955, petitioners filed suits against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346, 2461 *et seq.*, alleging that the government had negligently conducted the nuclear tests by not warning petitioners of the dangers the tests posed and that this negligence caused the death of petitioners' sheep. *Bulloch* v. *United States,* 145 F.Supp. 824 (D. Utah 1956).

The district court, after a bench trial, entered judgment for the United States. The court found that the United States was negligent, but concluded that petitioners lacked sufficient evidence to prove that radiation from the nuclear tests caused the animals' deaths. *Id.* at 827.

In 1981, petitioners, armed with evidence which had previously been concealed and with a congressional finding that the United States may have concealed from both petitioners and the public material facts concerning the nuclear tests of the 1950's,[1] filed actions to set aside the 1956 judgment as a fraud on the court under Fed. R. Civ. P. 60 (b). *Bulloch* v. *United States,* 95 F.R.D. 123 (D. Utah

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[1] Joint Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives and the Health and Scientific Research Subcommittee of the Labor and Human Resources Committee and the Committee on the Judiciary, United States Senate, 96th Cong.

1982). The district court granted that motion, finding that the United States had, *inter alia,* concealed material evidence from the court, had falsified reports and had wrongfully pressured scientific witnesses to change their opinions to favor the government. *Id., rev'd.,* 763 F.2d 1115 (10th Cir. 1985) (*en banc*). *See* page 4, *infra.*[2]

Petitioners also filed the instant suit as a *Bivens* action[3] against respondents, alleging that their misconduct had deprived petitioners of a fair trial and due process in their Tort Claims Act suit. In light of the findings of the district court, petitioners' complaint included several allegations regarding fraud on the court. The complaint, however, also broadly alleged deprivations of petitioners' constitutional rights (*See* App., *infra,* 15a, 16a, 22a-26a, 30a (quoting excerpts from the complaint))

The district court granted respondents' motion to dismiss. The court held that attorneys for the government were absolutely immune from liability if their actions were

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1st Sess., April 19, 1979, No. 96-41 at 99-101; *see also* Nos. 96-42, 96-129; *see also* App., *infra,* 13a.

[2] Respondents include, as petitioners allege, a Justice Department attorney who tried the 1956 case, assisted with trial preparation, assisted with Atomic Energy Commission ("AEC") strategy and collected a material document deliberately concealed by the Justice Department; AEC attorneys who assisted in trial preparation, who prepared false and deceptive answers to interrogatories, and who knew of at least one wrongfully concealed document; senior officials of the AEC who had knowledge of and helped conceal relevant research data, prepared and released false and misleading official, scientific reports and pressured witnesses to testify in accord with the AEC's official view; an army veterinarian and colonel who served as liaison in setting up the government's case, concealed relevant data, pressured witnesses to recant views opposing the government's position; government scientists working for agencies or for a government contractor, who knew of but concealed crucial data from petitioners and the trial court; and the government contractor. (*See* App., *infra,* 14a-17a, 21a-26a, 27a-30a.)

[3] *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).

undertaken in connection with the defense of the government or its agencies in a civil lawsuit. (App., *infra,* 7a, 18a-19a) With respect to the other defendants, the court concluded that the alleged conduct, "[h]owever morally wrong, tortious or deplorable" did not rise to the level of a constitutional deprivation and therefore did not deprive petitioners of a fair trial. (App., *infra,* 26a-27a)

2. The court of appeals affirmed (App., *infra,* 1a-5a), but for reasons completely different from those relied upon by the district court in dismissing petitioners' complaint. The court of appeals relied solely upon its *en banc* decision reversing the district court's grant of a new trial under Fed. R. Civ. P. 60 (b) in the Tort Claims Act suit. *Bulloch* v. *United States,* 763 F.2d 1115 (10th Cir. 1985).[4] The court of appeals held that petitioners were estopped from pursuing their *Bivens* claims because of the recent, intervening holding that there had been no fraud on the court in 1956. In reaching this result, the court pointed out that in *nine* of the more than *175* paragraphs of the complaint, petitioners had expressly referred to fraud on the court. (App., *infra,* 5a) Accordingly, the court of appeals concluded that fraud on the court was necessary to petitioners' claims for relief and that they were estopped to relitigate that issue in their *Bivens* suit.

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[4] In that opinion the court of appeals held that petitioners' proof had failed to demonstrate that the district court had been "corrupted" in the 1956 trial by the actions of the federal officers and attorneys. The court of appeals required the "corrupted" judiciary standard to show fraud upon the court under Fed. R. Civ. P. 60 (b). 763 F.2d at 1121. Petitioners filed a petition for a writ of certiorari on September 19, 1985, seeking review of the Tenth Circuit's interpretation of Rule 60 (b) in *Bulloch* v. *United States.* No. 85-472.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals makes a mockery of the procedural rule, oft repeated by this Court, that the allegations of a complaint must be interpreted most favorably to the plaintiff and that dismissal on the pleadings is unwarranted unless it "appear[s] beyond doubt" that no set of facts can be presented that will justify the recovery of any damages. *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957); *Block* v. *Neal,* 103 S.Ct. 1089, 1094 (1983).

There is simply no legitimate reason for the court of appeals to construe the complaint, which alleges violations by federal employees of constitutional rights, as being predicated exclusively upon a finding of fraud on the court. That finding is necessary for Rule 60 (b) relief in the Tort Claims Act suit; it is wholly unnecessary to the prosecution of the *Bivens* action.[5]

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[5] Estoppel would also be warranted if recovery for the constitutional tort required proof of fraud on the court. But petitioners' rights to a fair trial and due process, which the Court must assume respondents denied petitioners, are not dependent on their ability to obtain a Tort Claims Act judgment. The availability of a tort claim against the United States does not eliminate their independent right to sue to vindicate their due process right to a fair trial. Petitioners therefore should be permitted to pursue their constitutional tort theory independent of the Federal Tort Claims Act suit. *Cf. Carlson* v. *Green,* 446 U.S. 14 (1980) (plaintiff permitted to plead constitutional tort claim even though she also had a Federal Tort Claims Act claim).

The court of appeals recognized that collateral estoppel will not ordinarily apply when the first case requires a high level of proof but the second case requires a lesser burden. Contrary to its own statement, the result of the court of appeals' decision in this case is to require the petitioners to meet an increased and unprecedented burden of proof in their constitutional tort action. (*See* App., *infra,* 4a).

The holding below violated the basic principle of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice." *Compare Conley* v. *Gibson,* 355 U.S. at 48. The willingness of the court of appeals to trample on a basic procedural rule in a single lawsuit ordinarily might not be worthy of this Court's concern; but as part of a series of extraordinary procedural rulings by that court in the litigation arising out of the deaths of sheep and lambs exposed to nuclear fallout from Nevada tests in 1953, the issue provides an appropriate, if not a compelling, occasion for this Court to exercise its supervisory authority over federal court litigation.

In the *Bulloch* v. *United States* opinion by the court of appeals, the majority adopted a "curiously narrow construction" of Fed. R. Civ. P. 60 (b) (763 F.2d at 1125; McKay, J., dissenting), and, ignoring the proper limits of Fed. R. Civ. P. 52, that court "[f]or the first time in the history of the Tenth Circuit" reversed a trial court's award of a new trial. 763 F.2d at 1122 (McKay, J., dissenting). Now the same court, in complete disregard of Rule 8, construes nine paragraphs in a 175-paragraph complaint as limiting completely petitioners' theory of the case to fraud on the court. This it does solely in order to uphold a questionable ruling by the district court dismissing petitioners' complaint and thereby depriving petitioners of their day in court.[6]

With due respect to the court of appeals, petitioners are at a loss to understand these rulings unless they reflect a

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[6] The district court's decision affording government attorneys absolute immunity from a *Bivens* action when they defend the United States or one of its agencies against a civil tort claim raises at least a substantial issue under this Court's decisions in *Tower* v. *Glover,* 104 S.Ct. 2820 (1984); *Polk* v. *Dodson,* 454 U.S. 312 (1981) and *Ferri* v. *Ackerman,* 444 U.S. 193 (1979). In addition, since petitioners alleged that federal officials (including Justice

manifest desire to avoid judicial inquiry into the events surrounding the admitted exposure of the sheep to radiation from atmospheric nuclear tests, the effects of that exposure and the serious implications if government officials acted so wrongly. Regardless of the motivation of the court of appeals, the simple fact is that both of its holdings completely disregard basic procedural requirements adopted in both the Federal Rules and the prior decisions of this Court.

Because this case shares a common historical background with *Bulloch* v. *United States,* the Court may wish to consider reviewing both cases in tandem. Alternatively, the Court may wish to hold this petition pending its disposition of the Rule 60 (b) petition in *Bulloch* v. *United States,* because a reversal of the court of appeals' fraud on the court ruling would necessarily require reversal in this case as well.[7]

Department and agency attorneys) acted maliciously to conceal material evidence from the court and to interfere with the petitioners' right to a fair trial in violation of the basic due process requirements of the Fifth Amendment, the district court's dismissal of the complaint, without any factual development, is at least dubious.

[7] Even if the Court were to deny the petition in the Rule 60 (b) case, however, the court of appeals' crabbed reading of petitioners' complaint in this case would still be erroneous. We recognize that such an error viewed in isolation might not warrant plenary review; nevertheless this Court could appropriately consider summary reversal in light of the Tenth Circuit's obvious disregard of this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition pending its disposition of the related petition in *Bulloch* v. *United States,* No. 85-472 (filed September 19, 1985).

Respectfully submitted,

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October 2, 1985

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-1830
DC No. C-82-0230W

DAVID BULLOCH, McRAE N. BULLOCH,
KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER,
MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK,
for herself and as personal representative of the estate
of Douglas C. Clark, Deceased,
LAMBETH BROTHERS LIVESTOCK, a partnership,
T. RANDALL ADAMS, and DEE EVANS,
PLAINTIFFS-APPELLANTS,

v.

PAUL B. PEARSON, BERNARD TRUM,
GORDON DUNNING, LEO F. BUSTAD,
GENERAL ELECTRIC CORP., JOHN J. FINN,
CHARLES F. EASON, DON FOWLER, H. A. KORNBERG,
JOHN H. RUST,
DEFENDANTS-APPELLEES.

Before BARRETT, McWILLIAMS and LOGAN, Circuit Judges
Decided July 26, 1985

BARRETT, Circuit Judge.

The dispositive issue in this appeal is whether the plaintiffs are precluded from litigating the substantive issues underlying their constitutional claims following this Court's decision in *Bulloch v. United States,* No. 82-2245 (filed May 22, 1985) (en banc) (*Bulloch II*).

The present case, which may be termed *Bulloch III,* arises from the plaintiffs' efforts to reopen the judgment entered against them in *Bulloch v. United States,* 145 F. Supp. 824 (D. Utah 1956) (*Bulloch I*). In *Bulloch I* the court determined that the plaintiffs' sheep had not died as a result of radiation from atomic tests conducted at the Las Vegas Test Site in 1953. Some twenty-five years later the plaintiffs sought to reopen the judgment in *Bulloch I,* alleging that the government had committed fraud on the court by pressuring witnesses, withholding information, and giving misleading answers to interrogtories. The district court agreed — for the reasons the plaintiffs advanced — that the government had committed fraud on the court and accordingly ordered that the 1956 judgment be set aside. *Bulloch v. United States,* 95 F.R.D. 123 (D. Utah 1982). A panel of this Court reversed. *Bulloch v. United States,* 721 F.2d 713 (10th Cir. 1983). That decision was in turn upheld by a majority of this Court which, sitting en banc, found that there was "no evidence of fraud developed in the court hearings which covered all the details." *Bulloch II* at 12. For a detailed recital of the events giving rise to the present dispute, we refer the reader to these previous decisions.

The present suit is a *Bivens*-type action for damages against the government attorneys who prepared and tried *Bulloch I* and certain government employees who aided in the preparation and trial of *Bulloch I.*[1] See *Bivens v. Six*

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[1] Finn, Eason, and Fowler were the government attorneys who prepared and handled the government's defense. Pearson, Dunning, and Rust were Atomic Energy Commission (AEC) officials. Trum was an Army veterinarian who worked closely with the AEC. General Electric (GE) had contracted with the government to perform research on the effects of radiation and had conducted a series of such tests at Hanford, Washington, beginning in 1949. Bustad and Kornberg were GE researchers. In this opinion, we

Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). The thrust of the present suit is that these defendants, as a result of the actions and omissions complained about in *Bulloch II,* which allegedly constituted fraud on the court, deprived the plaintiffs of a fair trial (in *Bulloch I*) and thus their Fifth Amendment right to Due Process. The district court concluded that the government defense attorneys were absolutely immune from suit for their actions in this case and for that reason dismissed the suit as against them. With regard to the remaining government defendants, the district court concluded that their conduct did not rise to the level of a constitutional deprivation and therefore the complaint did not state a claim under *Bivens.* For purposes of this appeal, however, it is unnecessary for us to reach either of the grounds upon which the district court based its holding, because we conclude that the plaintiffs are collaterally estopped from litigating the substantive issues following our decision in *Bulloch II.*

Collateral estoppel, or, in modern phraseology, issue preclusion, refers to the principle that "a litigant in one lawsuit may not, in a later lawsuit, assert the contrary of issues actually decided in and necessary to the judgment of the first suit." *Slayton v. Willingham,* 726 F.2d 631, 633 (10th Cir. 1984). *See also* 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4416, at 136 (1981) (hereinafter "Wright and Miller"). The doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same

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assume, but do not decide, that these last three defendants — GE, Rustad [sic], and Kornberg—were "government employees." The remaining defendants, the Utah State Board of Health, Monroe James [sic], George Spendlove, and John Does I through XX, were never served with process and consequently there are no claims as to them before us in this appeal. *See* R. Vol. III, at 725-728.

party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery v. Share,* 439 U.S. 322, 326 (1979).

In the present case, the plaintiffs concede that the allegations they are now pressing against the government defendants in their individual capacities are identical to the allegations they made in *Bulloch II* in their effort to reopen the judgment in *Bulloch I.* They argue, however, that collateral estoppel should not apply because this case comes within the well-recognized exception to the application of collateral estoppel that failure to carry a high standard of proof does not preclude a later attempt to satisfy a lower standard. Wright and Miller, *supra,* § 4422, at 209, and cases cited therein. In order to have prevailed in *Bulloch II,* reason the plaintiffs, they were required to show "by clear and convincing evidence that there was fraud on the court . . . ." *Bulloch II,* at 15. On the other hand, reason the plaintiffs, the present action is a *Bivens* action in which they seek to prove, by a preponderance of the evidence, that the government defendants denied them due process of law. The standard of proof thus being different, argue the plaintiffs, collateral estoppel should not apply.

We agree with the plaintiffs insofar as they state the general rule that failure to carry a high standard of proof does not preclude a subsequent attempt to satisfy a lower standard. Our agreement does not dispose of the collateral estoppel issue, however. There is no doubt that the ultimate claim in the present case — denial of due process — is different from the primary claim in *Bulloch II* — fraud on the court. By the plaintiffs' own pleadings in the present case, however, in order for them to prevail on their due process claim they must establish that the government de-

fendants' actions and omissions constituted fraud on the court:

> 165. The defendants knew or should have known that their actions, omissions and manipulations constituted fraud upon the court.
> 166. The defendants knew or should have known that the commission of fraud upon the court was wrongful and unlawful.
> 167. The defendants knew or should have known that the commission of fraud upon the court would harm the plaintiffs and prevent them from obtaining fair trials and due process of law.

Plaintiffs' Amended Complaint, R. Vol. I, at 150.[2] Thus, as the plaintiffs admit in their own pleadings, in order to succeed on their due process claim, they must first establish fraud on the court. Although the plaintiffs recognize that, as a cause of action, fraud on the court must be proven by clear and convincing evidence, what in effect they seek is to have the standard of proof applicable to a *Bivens* action applied to their allegations of fraud on the court. Because plaintiffs allege fraud on the court as a prerequisite to their *Bivens* claim, however, we see no reason why they should not be required to prove fraud on the court under the same standard of proof applicable to an independent action for fraud on court. There can be no doubt that the plaintiffs had a full and fair opportunity to litigate the issue of fraud on the court in *Bulloch II*. Consequently, we hold that they are collaterally estopped from relitigating precisely the same isue — with the same standard of proof — under the guise of a *Bivens* action based on alleged violations of due process.

WE AFFIRM the District Court's dismissal of Plaintiffs'-Appellants' action.

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[2] The entire complaint is fraught with allegations of fraud upon the court. See Allegations Nos.: 122, 142, 171-174.

IN THE UNITED STATES DISTRICT COURT
UTAH DISTRICT – CENTRAL DIVISION

No. C-82-0230-W

DAVID BULLOCH, MCRAE N. BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, and DEE EVANS,

PLAINTIFFS,

V.

PAUL B. PEARSON, BERNARD TRUM, GORDON DUNNING, LEO F. BUSTAD, GENERAL ELECTRIC CORP., JOHN J. FINN, CHARLES F. EASON, DON FOWLER, H. A. KORNBERG, JOHN H. RUST, UTAH STATE BOARD OF HEALTH, MONROE HOLMES, GEORGE SPENDLOVE and JOHN DOES I through XX,

DEFENDANTS.

Entered Nov. 3, 1983

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DENYING PLAINTIFFS' MOTION FOR LEAVE TO COMMENCE DISCOVERY

WINDER, David K., District Judge:

On November 2, 1983 plaintiffs' motion for reconsideration and motion for leave to begin discovery were argued. Plaintiffs were represented by Dan S. Bushnell and M. Karlynn Hinman. The federal defendants were represented by R. Joseph Sher. Prior to the argument the court had read all memoranda pertinent to these motions. After taking the motion under advisement the court has considered again these memoranda, certain portions of the prior memoranda as well as those authorities relied upon by plaintiffs in their motion for reconsideration and which were not cited in their earlier memoranda. Being now fully advised,

IT IS HEREBY ORDERED that plaintiffs' motions for reconsideration and for leave to begin discovery are denied.

Plaintiffs have forcefully argued the two major points involved in this case in their memoranda in support of their motion for reconsideration, and neither of these points is free from doubt, (particularly (2) below). Nevertheless, the court is not persuaded to change its original decision entered June 21, 1983. Moreover, the court is of the opinion that that decision sufficiently addresses the points raised by the plaintiffs including those raised in their motion for reconsideration. That is, the court is still of the opinion (1) that defendants Fowler, Finn and Eason were acting in their capacity as government defense counsel performing acts intimately related to the judicial process and are therefore entitled to absolute immunity against plaintiffs' claims as against them and (2) that no claim for relief which rises to the level of a constitutional deprivation is stated in the amended complaint as against defendants Pearson, Dunning, Rust, Trum, GE, Bustad or Kornberg. These latter defendants were not defense counsel directly performing acts involved in the judicial process as were the three attorneys, and while the conduct alleged against them is grossly improper, it does not rise to the level of a violation of a constitutional duty.

Further, the court is of the opinion that plaintiffs' motion to allow discovery to begin in the areas sought by the plaintiffs must be denied. Given the court's opinion as to the merits of plaintiffs' claims against the federal defendants in their amended complaint and the court's reaffirmation of its earlier ruling of June 21, 1983, plus the language relating to discovery contained in *Harlow v. Fitzgerald,* 457 U.S. ....., 102 S. Ct. 2727 (1982), the court believes it would be inappropriate to allow the requested discovery prior to reversal, if any, of this decision.

The federal defendants' attorney is to prepare an appropriate formal order in accordance with this decision.

Dated this 16th day of November, 1983.

DAVID K. WINDER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
UTAH DISTRICT – CENTRAL DIVISION

No. C-82-0230-W

DAVID BULLOCH, McRAE N. BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, and DEE EVANS,

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DEFENDANTS.

Entered June 21, 1983

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

WINDER, David K., District Judge:

The defendants Paul B. Pearson, Bernard Trum, Gordon Dunning, Leo F. Bustad, John F. Finn, Charles F. Eason, Donald Fowler, H. A. Kornberg, John H. Rust and General Electric Corporation ("the federal defendants") moved this court to dismiss the plaintiffs' amended complaint.

That motion was argued orally on January 14, 1983. Prior to the hearing, the court reviewed all memoranda of counsel. Following the hearing, the court took the matter under advisement and has since read the additional memoranda filed by counsel, reread the memoranda on file at the time of the hearing and reviewed the authorities cited therein. Based on the foregoing, the court renders the following decision and order.

On August 4, 1982, the Senior United States District Judge for the District of Utah, A. Sherman Christensen, vacated the judgments and granted new trials in *Bulloch v. United States,* 145 F. Supp. 824 (D. Utah 1956) ("*Bulloch* I") and five other cases brought by sheep owners against the United States in 1955. That decision was based upon the court's finding that

> it appears by clear and convincing evidence, much of it documented, that representations made as the result of the conduct of government agents acting in the course of their employment were intentionally false and deceptive; that improper but successful attempts to pressure witnesses not to testify as to their real opinions, or to unduly discount their qualifications and opinions were applied; that a vital report was intentionally withheld and information in another report was presented in such a manner as to be deceitful, misleading, or only half true; that interrogatories were deceptively answered; that there was deliberate concealment of significant facts with reference to the possible effects of radiation upon the plaintiffs' sheep; and that by these convoluted actions and in related ways the processes of the court were manipulated to the improper and unacceptable advantage of the defendant at trial.

Bulloch v. United States, No. C-81-0123C, Memorandum, Findings of Fact and Conclusions of Law, slip op. at 55-56 (Aug. 4, 1982).

The plaintiffs in those actions subsequently brought an action for damages in the Fifth Judicial District Court of Iron County, State of Utah. The plaintiffs then filed an amended complaint, claiming that they had been deprived of a fair trial and due process. The case was properly removed to this court pursuant to 28 U.S.C. § 1442 (a) (1). Petition for Removal of a Civil Action (Mar. 22, 1982). The defendants now have moved to dismiss this action on the following grounds: (1) the court lacks jurisdiction of the subject matter of this civil action; (2) the court lacks jurisdiction *in personam* of the federal defendants; (3) venue in this court is improper; (4) service of process was insufficient; (5) the amended complaint fails to state a claim upon which relief can be granted; (6) the federal defendants are immune from the plaintiffs' claim for damages. Renewed Motion to Dismiss (July 26, 1982). Because the court is of the opinion that some of the federal defendants are absolutely immune for their actions which are the subject of this complaint and that the actions of the others did not result in constitutional deprivations, it will not reach the defendants' other contentions.

In December 1950, President Truman established a continental test site for nuclear weapons known as the Nevada Test Site.[1] Eleven atmospheric nuclear tests, the Upshot-Knothole test series, were conducted at that site between March 17 and June 4, 1953. One of the test shots, Nancy, was fired on March 24, 1953, and the radioactive fallout from Nancy traveled in a northerly direction from the Nevada Test Site. Another test shot, Harry, was fired on May 19, 1953, and fallout from Harry traveled in an easterly

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[1] For a discussion of the circumstances surrounding the establishment of the Nevada Testing Site, see *Bulloch v. United States*, No. C-81-0123C, Memorandum, Findings of Fact and Conclusions of Law (Aug. 4, 1982).

direction from the Nevada Test Site. At the time those test shots were fired, plaintiffs had 11,710 sheep grazing on winter pasture at various times in an area from forty miles north to 160 miles east of the Nevada Test Site. Of those sheep, an unusually high number of ewes and lambs died during the spring and summer of 1953.[2]

In 1955, the sheep owners brought six actions against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 to 2680, alleging that their sheep died as a result of being exposed to radioactive fallout from the atmospheric tests at the Nevada Test Site.

Bulloch I was tried first. At trial, the court ruled that "the Government was negligent in monitoring the tests in view of the presence of sheep herds in areas likely to be affected." *Bulloch v. United States,* No. C-81-0123C, Memorandum, Findings of Fact and Conclusions of Law, slip op. at 5 (Aug. 4, 1982). The critical issue in the case therefore was whether the atomic testing *caused* the damage to the sheep. The court believed that the overwhelming weight of scientific evidence supported the government's contention that the radiation did not cause the damage. It thus entered judgment for the United States. The plaintiffs in the other five lawsuits consented to the dismissal of their cases. The judgments of dismissal were never appealed.

Congress and the Department of Health, Education and Welfare conducted an investigation in 1979 as to the health effects from the nuclear tests at the Nevada Test Site in the 1950s and 1960s. Several documents and reports that had been classified were released at that time, and congressional hearings were held in Salt Lake City, Utah, and Las Vegas,

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[2] 1,420 lambing ewes and 2,970 new lambs died during that period. *Id.,* slip op. at 18.

Nevada. The testimony at those congressional hearings tended to show that the

> sheep in question were in areas of above normal radioactive fallout with reference to the "Nancy" shot on March 24 and the "Harry" shot on May 19, 1953; that the AEC did not have definite information as to the amount of actual radioactive fallout to which the sheep were exposed; that government records were changed to discount evidence of a causal relationship between radiation exposure of the sheep and their deaths; that without adequate justification the AEC disregarded or discounted clinical information supportive of a conclusion that radiation was the cause of death; that the AEC had evidence which substantiated the fact that the dead sheep had received considerably more radiation than the amount expressed in the AEC reports; that there were differences of opinion as to whether the experimentally produced lesions were comparable to those observed on the Cedar City sheep; and that the final report of the AEC was falsely presented as representing the unanimous view of those who participated in the investigation and signed the report.

Bulloch v. United States, No. C-81-0123C, Memorandum, Findings of Fact and Conclusions of Law, slip op. at 21-22 (Aug. 4, 1982). After those hearings were conducted, the plaintiffs conducted further investigations.[3]

On February 25, 1981, the plaintiffs commenced an action to vacate the 1956 judgments on the ground that the defendants in this case had perpetrated fraud on the court. The judgments were vacated and new trials were granted in those cases. The plaintiffs then filed an action in state court. After the plaintiffs filed an amended complaint in

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[3] The facts in this opinion are taken from the findings of fact contained in *id.*

which they contended that those same actions by the federal defendants deprived them of a fair trial and due process in violation of the United States Constitution and state law and that they are entitled to damages, the action was removed to this court.[4]

GOVERNMENT ATTORNEYS

The plaintiffs have sued three of the government defense attorneys who directed and/or participated in the defense of *Bulloch I*. Charles F. Eason was an attorney employed by the Office of the General Counsel of AEC who assisted in the *Bulloch I* trial. Don Fowler was an attorney employed by AEC who conducted meetings concerning the plaintiffs' suits on the subject matter thereof, drafted responses to interrogatories and was present at the *Bulloch I* trial. John J. Finn was an attorney for the Department of Justice who conducted the government's case in *Bulloch I*, and participated in pretrial conferences and the preparation for trial. The allegations against those three men are essentially that they: (1) concealed and withheld evidence; (2) coerced, threatened, deceived and intimidated witnesses; and (3) responded deceitfully to interrogatories. The specific allegations against those defendants are:

> 55. . . . Finn and, on information and belief, other defendants, visited Veenstra in his office in San Francisco and wrongfully coerced, intimidated and attempted to induce Veenstra to change his position on the effect of the radiation from the nuclear tests on the sheep.
> * * *

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[4] Because the Utah State Board of Health, Monroe Holmes, George Spendlove and John Does I through XX have not joined in this motion to dismiss or filed a separate motion to dismiss, the court will not discuss the claims against them. The court notes, however, that the Eleventh Amendment may bar an action against them. *See Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000.

59. On information and belief, Finn wrongfully conspired and colluded with and assisted Pearson and Trum in deceiving Veenstra into believing that he was the only scientist who had disagreed with the AEC about the sheep losses and in convincing him that he had a duty as a member of the Government team not to state his own independent conclusion, but to support the AEC view.

* * *

61. As of November 29, 1955, Thompsett's letter to Cole was in possession of . . . Fowler and Eason.

* * *

86. Finn, Eason, and Fowler knew, or should have known, of the policies adopted and the steps taken by Pearson, Rust, Dunning, and Trum, and that these would deprive the plaintiffs of the opportunity to discover and examine evidence, call, examine or cross-examine witnesses and deprive them of a fair trial.

87. Fowler and Eason deliberately refrained from divulging the existence of the letter from Thompsett to Cole described in paragraph 61 above, and knew that it was in the possession of the AEC general counsel.

88. Finn, Fowler and Eason participated in, knew, or should have known about the pressures being put on witnesses to change their views or to refrain from participating in the *Bulloch* trial.

89. Finn, Fowler, Eason . . . deliberately, maliciously, wantonly, individually and in concert, concealed or otherwise classified documents and covered up their activities; which such documents and knowledge of such activities were essential to the plaintiffs' rights to obtain a fair trial of their injuries.

* * *

112. As employees, officers or agents of the Government, defendants . . . Finn, Eason and Fowler

. . . had a duty to uphold the law and the Constitution, to exercise their duties faithfully and not to deprive persons, including the plaintiffs, consciously, maliciously, deliberately and willfully of their rights under the Constitution.

* * *

171. Defendants Finn, Eason and Fowler, as attorneys, had a duty as officers of the court to see that fraud was not committed on the court and to conduct themselves and the defense of the Government's case in good faith.

172. Defendants Finn, Eason and Fowler knew or should have known that their conduct of the trial preparation and that their omissions to come forward at trial would constitute fraud upon the court or would aid in this commission of that fraud.

173. Defendants Finn, Eason and Fowler knew or should have known that their conduct and omissions and the fraud upon the court and the conduct and omissions of the other defendants would harm the plaintiffs and deprive them of due process and their rights under the Constitution.

174. Defendants Finn, Eason and Fowler performed their actions or omitted to take actions in commission of, furtherance of or concealment of fraud upon the court with knowledge and with wanton and malicious disregard for the plaintiffs and their rights to a fair trial and to due process of law.

175. As officers, employees or agents of the Government . . . or as attorneys and officers of the court, the defendants had a duty to perform their duties and to exercise the powers and responsibilities of their offices or their employment rightfully, lawfully and in good faith.

Amended Complaint, C-82-0230A (Oct. 6, 1982).[5] Assuming that those allegations are true, this action still must be dismissed against these federal defendants. It is clear from the pleadings that the allegations against these federal defendants are based completely on their actions as defense counsel for the government. Consequently, defendants Fowler's, Finn's and Eason's allegedly unconstitutional acts were an integral part of the judicial process, and they are absolutely immune for such acts.[6] *See Flood v. Harrington,* 532 F.2d 1248 (9th Cir. 1976).

It is well established that judges, prosecutors, witnesses and people performing quasi-judicial functions are absolutely immune from damage actions based on acts performed within the scope of their official duties. *See, e.g., Briscoe v. Lahue,* No. 81-1404 (S. Ct. Mar. 7, 1976) (police officer witnesses); *Butz v. Economou,* 438 U.S. 478 (1978) (federal hearing examiners and agency officials performing functions analogous to those of a prosecutor); *Stump v. Sparkman,* 435 U.S. 349 (1978) (state judge); *Imbler v.*

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[5] There are also general allegations against all the defendants. See Amended Complaint, No. C-82-0230A, paragraphs 142-170. Those allegations are essentially the same as the specific allegations against these defendants.

[6] The Third Claim for Relief which is based on the violation of state tort law, Utah Code Ann. § 78-51-31 (1953) and the Canons of Ethics and the Rules of the federal courts also must be dismissed. That claim either fails to state a claim or only states a claim for a common law tort. These federal executive officials were acting within the outer perimeter of office, were exercising the discretion of those offices, and the policies underlying absolute immunity outweigh the potential, recurring harm that may be caused to individuals. Consequently, these federal defendants are absolutely immune from this common law tort suit. *See Barr v. Matteo,* 360 U.S. 564 (1959); *Chavez v. Singer,* 698 F.2d 420 (10th Cir. 1983). *See also Butz* v. *Economou,* 430 U.S. 426 (1978).

Pachtman, 424 U.S. 409 (1976) (state prosecutors).[7] In making its determination that people functioning in each of those capacities is absolutely immune, the court has inquired "into the immunity historically accorded the relevant officer at common law and the interests behind it." *Imbler,* 424 U.S. at 421. The Supreme Court has not addressed the issue of whether government attorneys defending a civil action are absolutely immune from damage actions arising out of acts performed in that capacity. However, this court is of the opinion that the common law and the policies underlying the immunities accorded judges, witnesses, prosecutors and quasi-judicial officers mandate extending absolute immunity to government defense counsel for official acts intimately related to the judicial process.[8] Furthermore, the scope of such immunity encompasses acts performed in preparation of trial as well as acts performed

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[7] For purpose of that immunity, the courts draw no distinction "between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz,* 438 U.S. at 504.

[8] The court believes that *Ferri v. Ackerman,* 444 U.S. 193 (1979) is readily distinguishable from this type of a factual situation. In *Ferri,* the Supreme Court was dealing with a state malpractice action brought by a former client against a court appointed defense counsel. The policies that militate against opposing parties being permitted to bring civil suits against each other are not as involved in malpractice actions. The Supreme Court may have recognized that difference when it noted that its discussion was "confined to immunity in malpractice actions" and that it was not addressing "the question whether defense counsel is immune from other kinds of tort suits such as a defamation action brought by someone other than his client." 444 U.S. at 204 n.22.

in the actual trial.[9] To hold otherwise would seriously undermine the principle of absolute immunity.

"The common law provided absolute immunity for subsequent damages liability for *all persons* — governmental or otherwise — who were integral parts of the judicial process." *Briscoe v. Lahue,* slip op. at 10; *Yaselli v. Goff,* 12 F.2d 396 (2d Cir. 1926), *aff'd,* 275 U.S. 503 (1927). That cluster of immunities protecting the participants in a trial extended to parties, witnesses, counsel, the jury and the judge. *See Briscoe v. Lahue,* slip op. at 10. Those immunities stemmed from the judicial process' characteristics,[10] *Briscoe v. Lahue,* slip op. at 10, and "the policy of

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[9] Although the Supreme Court left open the question whether a government witness is entitled to absolute immunity for testimony at pretrial proceedings, *Briscoe v. Lahue,* No. 81-1040, slip op. at 4 n.5 (S. Ct. Mar. 7, 1983), the court has stated that a prosecutor is absolutely immune for tasks "fairly within his function as an advocate." *Imbler,* 424 U.S. at 430 n.32. See *Dohgish v. Tooley,* 670 F.2d 934 (10th Cir. 1982), *cert. denied,* 103 S. Ct. 60. Furthermore, subsequent federal cases have clarified that a prosecutor is not immune for administrative or investigative actions, see *Coleman v. Turpen,* 697 F.2d 1341 (10th Cir. 1982), but is immune for activities "made in the context of a quasi-judicial function." *Forsyth v. Kleindienst,* 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied,* 453 U.S. 913, *reh'g denied,* 102 S. Ct. 892. In doing so, the courts recognize that it is necessary to expand the scope of absolute immunity beyond initiating a prosecution and presenting the state's case to fully protect a prosecutor performing those functions.

[10] As the Supreme Court stated in *Butz v. Economou,* 438 U.S. 478 (1978):

> [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus .... Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Id. at 512.

protecting the judicial process,"[11] *Imbler,* 424 U.S. at 439. Recent decisions also have focused on the safeguards built into the judicial process that "tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Butz,* 438 U.S. at 512.[12] Thus, although the court condemns the type of activities in which these federal defendants allegedly engaged and finds such, if true, to be nothing less than disgraceful, the functions per-

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[11] The *Imbler* Court stated the need to protect the judicial process as follows:

> The reasons for this rule [of absolute immunity] are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge."

Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (citation omitted).

[12] Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error.

Butz v. Economou, 438 U.S. at 512.

In addition, the Federal Rules of Civil Procedure provide means to challenge unconstitutional proceedings, *cf. id.* at 515-16 ("defendant in enforcement proceeding has ample opportunity to challenge the legality of the proceeding .... Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review."), there are criminal sanctions available for people who willfully deprive others of their constitutional rights, *see* 18 U.S.C. § 242, and government attorneys are amenable to professional discipline. *See* ABA Code of Professional Responsibility. Thus, the imposition of civil liability is *not* the only way to ensure that these participants in the judicial process respect and uphold peoples' constitutional rights.

formed by these federal defendants and the context in which they were performed nevertheless justify extending absolute immunity to them. "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle,* 177 F.2d 579, 582 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

FEDERAL EMPLOYEES

Paul B. Pearson was chief of the Biology Branch, United States Division of Biology and Medicine. He was responsible for monitoring and collecting all data and for correlating studies of all persons concerning toxic or deadly effects of the fusion materials or other products from the nuclear tests on the sheep that were near the test site. Bernard Trum was a lieutenant colonel in the Veterinary Corps of the United States Army and was assigned to the Atomic Energy Commission Agricultural Research Program at Oakridge, Tennessee. He was responsible for the supervision of research regarding toxic or deadly effects of radiation on sheep and the coordination of that research with the investigation of the illnesses, injuries, deaths and other problems of the sheep that had been near the test site. Defendant Trum met with sheepherders in Cedar City, Utah, assisted the government attorneys with trial preparation and attended the *Bulloch I* trial. Gordon Dunning was an employee at the headquarters of the Atomic Energy Commission ("AEC"). He assisted Pearson with monitoring and collecting all data and correlating studies of all persons concerning toxic or deadly effects of the fission materials or other products, including radiation from nuclear tests, on the sheep that had been near the test site. John H. Rust was an employee of AEC. He assisted Pearson with monitoring and collecting all data and correlating the studies of all persons concerning toxic or deadly effects of

the fission materials or other products, including radiation from nuclear tests, on sheep that had been near the test site.

The plaintiffs allege that those four federal defendants engaged in the following specific activities and that those activities deprived them of their constitutional rights.

> 43. Pearson, Rust, Dunning and Trum formulated the AEC's position with regard to alleged liability for the losses suffered by the sheep near the test site.
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> 44. With wanton, malicious and deliberate disregard of the plaintiffs and their rights, Pearson, Rust, Dunning and Trum determined that the AEC would deny any and all liability for the losses of the sheep.
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> 45. This policy decision was made prior to the completion of all scientific investigations and injuries.
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> 46. Pearson, Rust, Dunning and Trum reached their decision in order:
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> > (a) to avoid risking a dangerous precedent which would require the Government to acknowledge fault and pay damages to reimburse injured parties; and
> >
> > (b) to avoid any possibility that the AEC would lose the funds necessary to further nuclear tests.
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> * * *
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> 52. Veenstra[13] and Thompsett[14] made it known to . . . Pearson, Rust, Dunning, and Trum, that

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[13] Veenstra was a United States Army Veterinarian assigned to the U.S. Naval Radiological Defense Laboratory in San Francisco, California, who participated in initial and subsequent investigations of the sheep losses.

[14] Thompsett was a veterinarian in private practice in Los Alamos, New Mexico, who participated in the investigation of the sheep losses at the request of the AEC.

they believed that radiation from the nuclear tests had contributed to the sheep losses.

53. Letters sent by Veenstra to the AEC, Pearson and Trum between June, 1953, and April, 1955, show that Veenstra had concluded that "radiation was at least a contributing factor to the loss of [sheep]."

54. In responding letters, Pearson and Trum attempted to get Veenstra to change his mind.[15]

55. Trum . . . and, on information and belief, other defendants, visited Veenstra in his office in San Francisco and wrongfully coerced, intimidated and attempted to induce Veenstra to change his position on the effect of the radiation from the nuclear tests on the sheep.[16]

56. On April 7, 1953, Veenstra wrote two letters to Trum, the first of which was typed and never sent.[17]

57. In the first letter Veenstra stated that his position had not changed and that he still held the opinion that the radiation had contributed to the sheep losses.

58. In Veenstra's second letter to Trum on April 7, 1953, which he wrote by hand, he made a statement evidencing his abandonment of his own earlier conclusions by stating:

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[15] According to Judge Christensen's findings, Pearson wrote such a letter to Dr. Veenstra in October 1953, and Trum wrote such a letter to Dr. Veenstra in March 1955.

[16] According to Judge Christensen's findings, that visit took place on April 2, 1955.

[17] Although the Plaintiffs allege that the letters were written in 1953, Judge Christensen found that the letters were written in April, 1955.

> If called upon for a statement I will just report what we found and say we felt it a possibility that should be pointed out for consideration.

59. On information and belief, Finn wrongfully conspired and colluded with and assisted Pearson and Trum in deceiving Veenstra into believing that he was the only scientist who had disagreed with the AEC about the sheep losses and in convincing him that he had a duty as a member of the Government team not to state his own independent conclusion, but to support the AEC view.

* * *

62. In an attempt to coerce Thompsett to adopt the AEC's official line, which he had helped construct, Trum drafted a model letter for Thompsett to sign and send to one Seth Woodruff of the AEC.

63. Trum's model letter would have had Thompsett confirm that he had "reevaluated [his] position as more information became available," and had changed his position, thus now stating that radiation was not a contributing factor to the sheep losses.

64. Trum sent the model letter under a cover letter dated May 9, 1955, instructing Thompsett to submit the endorsed model to King.

65. Thompsett did not change his opinion, but he did endorse the model letter.

66. When plaintiff David Bulloch's 1954 suit went to trial, Thompsett disqualified himself and refused to contradict the AEC's (and hence, in that case, the Government's) position.

* * *

83. In the course of trial preparation, Pearson, Rust, Dunning and Trum, deliberately, wantonly, maliciously and individually or in concert, took the following steps:

(a) classified evidence adverse to their chosen AEC position in order to prohibit public or judicial access to it;

(b) deliberately manipulated data about and computations of radiation levels from the nuclear tests to show much lower levels on animals and forage than actually occurred, substantially understating the true levels;

(c) concealed physical evidence from researchers who were attempting to make independent and impartial studies of the effects of radiation;

(d) modified independent scientific reports by deleting references to radiation as being a cause of the sheep losses;

(e) coerced such scientists to disqualify themselves from testifying in the *Bulloch* trial;

* * *

(g) ordered scientific reports being prepared at Hanford, Washington, to be prepared so as to conceal data and create false impressions or state false conclusions about the effect of radiation on sheep;

(h) ignored and deliberately disregarded scientific conclusions made by persons who disagreed with them;

(i) intentionally misled the public and the judiciary through published reports and press releases to believe (erroneously) that all scientists who had studied the sheep losses had concluded that radiation from the nuclear tests had not been a contributing factor in the losses;

> (j) inhibited the free flow of information among scientists studying the sheep losses, and even made deliberately false statements.
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> 84. Pearson, Dunning, Rust, and Trum knew that what they were doing and the policy they had made would prevent the plaintiffs from obtaining relevant evidence in preparation of their suits, would prevent them from calling, examining or cross-examining witnesses and would prevent them from having a fair trial of their claims.
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> * * *
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> 89. . . . Pearson, Dunning, Rust, and Trum deliberately, maliciously, wantonly, individually, and in concert, concealed or otherwise classified documents and covered up their activities; which such documents and knowledge of such activities were essential to the plaintiffs' rights to obtain a fair trial of their injuries.
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> * * *
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> 112. As employees, officers or agents of the Government, defendants Pearson, Rust, Dunning, Trum . . . had a duty to uphold the law and the Constitution, to exercise their duties faithfully, and not to deprive persons, including the plaintiffs, consciously, maliciously, deliberately and willfully of their rights under the Constitution.

Amended Complaint, C-82-0230A (Oct. 6, 1982).[18] The court has not been cited to any authority and is not aware of any authority that would support the plaintiffs' contention that those allegations, if true, would rise to the level of a constitutional deprivation. However morally wrong, tortious or deplorable those actions or failures to act may

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[18] There are also general allegations against all the defendants. See Amended Complaint, paragraphs 142-170. Those allegations are essentially the same as the specific allegations against these defendants.

be, these federal employees' misconduct simply did not rise to the level of a constitutional violation, and there is no claim stated under the *Bivens* doctrine.[19] As the Supreme Court has repeatedly acknowledged, just because a common law tort is allegedly committed by a federal employee does not mean that a constitutional deprivation has occurred. *See, e.g., Baker v. McCollan,* 443 U.S. 137 (1979); *Paul v. Davis,* 424 U.S. 693 (1976).

G.E. AND ITS EMPLOYEES

General Electric Corporation ("GE") entered into a contract ("the contract") with the AEC whereby GE agreed to conduct scientific experiments on the effect of radiation at the Hanford, Washington works. Leo F. Bustad was a researcher veterinarian employed by GE. He performed work on its behalf under the contract, conducting most of the scientific experiments on the effect of radiation on sheep at the Hanford works. H. A. Kornberg also was an employee of GE's who performed work on behalf of GE under the contract. The allegations against these federal defendants on which the plaintiffs base their constitutional claims are as follows:

> 70. Bustad also worked closely with the AEC to coordinate the Hanford study with other studies

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[19] Although these federal defendants' conduct may violate some federal law, no where in the complaint or the papers on file with the court do the plaintiffs allege or argue that the defendants' conduct constitutes such a violation. Consequently, the court need not address that possibility. Any common law or state law claims the plaintiffs may have against these federal defendants are probably barred by *Barr v. Matteo,* 360 U.S. 564 (1959). See note 6, *supra.* The court, however, makes no finding in that regard and bases its dismissal of the pendant state claims solely on there no longer being federal claims against these federal defendants. *See,* Wright, Miller & Cooper, *Federal Practice and Procedure* §3567, at 451-53 (1975).

being made at AEC facilities in Oakridge, Tennessee.

71. Bustad, with others, prepared a report entitled *A Compative Study of Hanford and Utah Sheep* . . . .

* * *

74. The [report] described in paragraph 71 above [was] attached to the Final Report [of the AEC concluding that radiation had not been the cause or even a contributing factor in the sheep losses].

* * *

76. Other and further work had been performed from 1949 and was being performed at Hanford by GE, Bust?-l[sic], Kornberg and others, resulting in interim reports issued by 1953 and a composite report on fetal lambs which was published at some time after the trial of the *Bulloch* case in 1956.

77. The interim reports and the further studies at Hanford showed serious deleterious effects of radiation on sheep, particularly with regard to fetal lambs, so that by 1953 defendants knew of the deleterious effects of radiation on fetal lambs.

78. The fetal lamb report and the interim reports and studies of the defendants showed remarkable similarities between the losses suffered by plaintiffs' sheep and laboratory animals, particularly as to the problems of lambs born to plaintiffs' sheep at the lambing at the time of or following the nuclear tests.

79. The fetal lamb report was not revealed to the plaintiffs but was concealed and did not become available to them until after 1979.

80. The fetal lamb report, its existence and its preparation, and interim reports were deliberately concealed from plaintiffs and some were classified

so as to be unavailable to them in preparation for or at their trials in 1955.[20]

* * *

97. GE, Bustad and Kornberg, because of the nature of the contract with the AEC, acted as an agent or agents of and in concert with the AEC and other Government agencies and their officers and employees and under such authority.

98. Bustad visited Utah to meet with the ranchers to discuss his reports, assisted with trial preparation on behalf of the government and also attended the *Bulloch* trial as an integral part of his duties.

99. GE, Bustad and Kornberg, as agents of the AEC and working closely with the AEC and its officers and employees acted under color of authority of the AEC.

* * *

112. ... GE ... had a duty to uphold the law and the Constitution, to execute [its] duties faithfully and not to deprive persons, including plaintiffs, consciously, maliciously, deliberately and willfully of their rights under the Constitution.

* * *

119. GE, Bustad, and Kornberg, as agents of the government and as members of the scientific community, had a duty to perform their tasks of research, analysis and comparison of data honestly, fairly and accurately and to perform in accord with the Constitution and the law.

120. GE, Bustad, and Kornberg, as parties to or performers of a contract within the Government had a duty to perform their tasks with respect for

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[20] Those who made the decision to classify documents are arguably absolutely immune for such actions on the basis of national security. *See Harlow v. Fitzgerald,* 102 S. Ct. 2727, 2735 (1982); *Tigue v. Swain,* 585 F.2d 909 (8th Cir. 1978).

> scientific accuracy and for the Constitution and the law as implied by their conduct.
>
> 121. GE, Bustad, and Kornberg performed their tasks and their contractual duties with blatant, malicious and knowing disregard for truth, accuracy and the standards of the law and the Constitution.
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> 122. GE, Bustad, and Kornberg, by their actions and in their conscious disregard for their duties and the law and the Constitution, committed fraud upon the court and deprived the plaintiffs of their rights to a fair trial and to due process of law.

Amended Complaint, C-82-0230A (Oct. 6, 1982).[21] Taking the plaintiffs' factual allegations as true and assuming that these federal defendants were federal employees, *see Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir. 1967), this action still must be dismissed against defendants GE, Bustad and Kornberg. The court has not been cited to any authority and is not aware of any authority that imposed a constitutional duty on these federal defendants to conduct or report their research in a particular way or to divulge the existence of any reports, data or experiments that they prepared or of which they were aware. *Cf. Martinez v. Winner,* 548 F. Supp. 278, 319-21 (D.Colo. 1982). Consequently, the plaintiffs have failed to state a constitutional claim against

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[21] There also are general allegations against all the federal defendants. See Amended Complaint, No. C-82-0230A, paragraphs 142-170. Those allegations are essentially the same as the specific allegations against these federal defendants. With respect to the allegation regarding pressuring witnesses and classifying documents, however, the court finds that those conclusory allegations have not been supported by factual allegations and thus do not apply to these federal defendants.

these federal defendants, and the action must be dismissed as to them.[22]

Accordingly,

IT IS HEREBY ORDERED that the federal defendants' motion to dismiss this action as to them is granted.

Dated this 21st day of June, 1983.

/s/ David K. Winder
United States District Judge

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[22] The court makes no ruling on whether the plaintiffs have any common law or state law claims against these defendants. It is unclear in the amended complaint whether the plaintiffs have asserted any such claim against these defendants. In the event that plaintiffs have attempted to assert such claims, they are dismissed without prejudice on the ground that there are no longer any federal claims against these federal defendants. *See* Wright, Miller & Cooper, *Federal Practice and Procedure* § 3567, at 451-453 (1975).